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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act
Competitive Bidding)

PP Docket No. 93-253

COMMENTS OF HUGHES COMMUNICATIONS GALAXY, INC. AND DIRECTV, INC.

Hughes Communications Galaxy, Inc. ("HCG") and DirecTv, Inc.

("DirecTv") hereby submit the following comments in the above-captioned matter.

I. INTRODUCTION

HCG and DirecTv are wholly-owned sister subsidiaries of Hughes Communications, Inc. ("HCI"). HCG is a Commission licensee in both the fixed satellite service (C and Ku band) and the direct broadcast satellite ("DBS") service. DirecTv is the DBS operating, customer service and programming acquisition arm of the HCI family.

The Commission has sought comment regarding its implementation of new Section 309(j) to the Communications Act, recently added by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), which for the first time gives the Commission the express authority to employ competitive bidding procedures to choose from among two or more mutually exclusive, accepted applications for initial licenses, provided that the service is principally one in which the spectrum is used to provide service to subscribers for compensation.^{1/} In defining the parameters of its new competitive bidding authority, the

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^{1/} See In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making, PP Docket No. 93-253 (October 12, 1993) ("Auction Notice").

Commission has requested comment on whether and how that authority should apply to a number of different services, including both DBS ^{2/} and fixed-satellite services.^{3/}

HCG and DirecTv strongly urge the Commission not to apply its competitive bidding authority to either of these satellite services. First, in keeping with its traditional, flexible approach to licensing these services, which is designed to take into account the special circumstances surrounding the construction, launch and operation of satellite systems, the Commission strenuously has sought to avoid any characterization of fixed service or DBS satellite applications as "mutually exclusive." Thus, the fundamental substantive basis for the Commission to invoke its competitive bidding authority is lacking.

More important, the Commission's present group processing and licensing procedures for domestic satellite and DBS applications have a proven track record of efficient and fair allocation of the orbit-spectrum resource that the Commission should not lightly displace. There is no policy justification for changing the Commission's present methods of licensing FSS and DBS satellites.

^{2/} Id. at 8, ¶ 23.

^{3/} Id. at 53, ¶ 153.

II. THE COMMISSION'S LICENSING POLICIES FOR BOTH FSS AND DBS SATELLITE SYSTEMS HAVE PRESUMPTIVELY DISFAVORED FINDINGS OF MUTUAL EXCLUSIVITY

By its terms, Section 309(j) permits the use of auctions as a selection mechanism for licenses only if mutual exclusivity exists among applications that have not been accepted for filing.^{4/} Thus, as a threshold matter, if mutual exclusivity among applications does not exist, a license is not subject to competitive bidding.^{5/}

In contrast to many terrestrial services, the Commission's touchstone in establishing licensing procedures to consider both DBS and FSS satellite applications has always been flexibility.^{6/} From the beginning of these services, the Commission has recognized the high risk, large capital investment requirements and long lead times characteristic of the domestic satellite industry. Thus, the Commission's flexible licensing policies and procedures have avoided institutional restraints and inhibitions to the development of the technology, and have allowed the Commission to adjust its policies as experience dictates.^{7/} The Commission has considered such flexibility to be vital in

^{4/} According to the Budget Act, in cases where mutually exclusive applications have been filed for a license or permit that involves a "use" of the spectrum covered by the new legislation, the FCC may use a system of competitive bidding to grant such a license or permit. A "use" of the spectrum to which the Commission may apply a system of competitive bidding is one for which the Commission determines that the principal use will involve, or is reasonably likely to involve, the licensee's receipt of compensation from subscribers in return for which the licensee enables those subscribers either to receive or transmit directly communications signals that are transmitted utilizing frequencies on which the licensee is licensed to operate. See Section 309(j)(1)(2); Auction Notice at 4-5, ¶¶ 11-12. Because, as set forth below, there is no mutual exclusivity in the FSS or DBS services, these comments do not address the issue of whether FSS or DBS services are ones in which the spectrum is used to provide service to subscribers for compensation.

^{5/} See Auction Notice at 7, ¶ 22.

^{6/} See GTE Satellite Corp., 93 FCC 2d 832, 837 (1983) ("GTE Reconsideration Order").

^{7/} Id. at 838.

accommodating new entrants, the changing requirements of existing carriers, and satellites proposed by other countries.^{8/} Thus, an applicant's request for a particular orbital location cannot be dispositive of the location actually assigned by the Commission.

With respect to fixed service satellites, the Commission has assiduously attempted to avoid comparative hearings or other procedural mechanisms that could cause delay in the processing of satellite applications. Correspondingly, in light of its flexible licensing policies, the Commission presumptively has chosen not to view satellite applications as mutually exclusive:

[T]he objective of our policies and procedures has been to accommodate as many applicants as is efficiently possible with a minimum of administrative costs or delays. In particular, artificial or inflexible definitions of mutual exclusivity have been avoided and an increasing number of satellites have been authorized to satisfy growing demand. We have thus avoided traditional administrative procedures, such as comparative hearings, that have been used in other services that we regulate. The result has been an industry that has served the public interest through the timely implementation of facilities and services.^{9/}

Even in situations where domestic satellite applicants have requested identical orbital locations, the Commission has resolved such conflicts through its processing procedures and orbit assignment orders, and avoided findings of mutual exclusivity.^{10/}

Similarly, with respect to DBS applications, the Commission's interim processing guidelines reflected the Commission's determination that DBS applications "would not be considered mutually exclusive so long as sufficient channels and positions were

^{8/} Id.

^{9/} Id. at 840 (emphasis added).

^{10/} Id. at 839 & n.15; see, e.g., GTE Satellite Corporations, 84 FCC 2d 562 (1981).

available to cover all applications filed prior to the cut-off date."^{11/} Following the conclusion of the 1983 Regional Administrative Radio Conference (RARC-83), permanent processing procedures were established reaffirming the Commission's policy that orbital locations and channels for DBS would be considered interchangeable and equivalent.^{12/} The Commission decided that particular DBS orbital positions would be granted on a "first-come, first-served" basis,^{13/} and Part 100 of the Commission's rules governing DBS expressly seeks to preempt the potential for mutually exclusive applications, stating that "conflicting requests for frequencies and orbital positions will not necessarily give rise to comparative hearing rights as long as unassigned frequencies and orbital slots remain."^{14/}

The Commission's traditional, flexible treatment in licensing both FSS and DBS services suggests that it would be wrong for the Commission in this proceeding to find as a general proposition that either domestic fixed or DBS satellite applications are "mutually

^{11/} Hughes Communications Galaxy, Inc., File No. DBS-84-02, 1985 FCC LEXIS 2731 (1985) (emphasis added); see Satellite Syndicated Systems, Inc., 99 FCC 2d 1369, 1370 & n.2 (1984); DBS Report and Order, 90 FCC 2d 676, 719 (1982).

^{12/} See Processing Procedures Regarding the Direct Broadcast Satellite Service, 95 FCC 2d 250, 253 (1983).

^{13/} Id.

^{14/} 47 C.F.R. § 100.13. Thus, in Hughes Communications Galaxy, Inc., the Commission observed:

The Commission has already affirmed the "first-come first-served" approach in response to another claim of mutual exclusivity and Ashbacker rights by a permittee opposing an orbit/channel reassignment . . . Unlike situations where the Ashbacker doctrine applies, i.e., where the grant of one application necessarily precludes another, only the assignment of interchangeable orbital locations is involved here. We do not view the requests by NEX and Hughes as mutually exclusive since sufficient orbital positions and channels remain available to make orbit assignments to all current permittees.

exclusive" for purposes of subjecting these services to competitive bidding. This is true particularly because, as the Commission is aware, orbital slots and channels remain available for assignment in both services. The Commission has found this fact to be dispositive in addressing questions of mutual exclusivity for both services.^{15/} Thus, at this time neither the FSS nor the DBS services meet Congress's general threshold requirement for exercising its competitive bidding authority.

III. THERE IS NO JUSTIFICATION FOR DISPLACING THE COMMISSION'S SUCCESSFUL GROUP PROCESSING POLICIES AND PROCEDURES FOR BOTH THE FSS AND DBS SERVICES

Apart from the failure of the FSS and DBS services to meet the threshold criterion for invocation of the Commission's competitive bidding authority, i.e., mutual exclusivity, there is no independent policy justification for displacing the Commission's traditional group processing procedures for satellite applications. These policies have proved to be extremely successful in efficiently allocating the orbit-spectrum resource and rapidly deploying satellite systems to the public in a manner that responds effectively to a "complex process involving many factors, parties, and even at times, foreign countries."^{16/}

^{15/} See, e.g., Western Union Telegraph, FCC 85-391 (released August 29, 1985) (FSS) (no mutual exclusivity where "additional orbital locations were available for assignment"); Hughes Communications Galaxy, 1985 LEXIS 2731 (1985) (DBS) ("We do not view the request by NEX and Hughes as mutually exclusive since sufficient orbital positions and channels remain available to make orbital assignments to all current permittees."); GTE Reconsideration Order, 93 FCC 2d at 839 (FSS) (no mutual exclusivity where "at least one orbital location [was] available for assignment" in applicant's requested portion of orbital arc, and where applicant's claim "ignored" Commission's satellite processing procedures which have avoided "artificial or inflexible definitions of mutual exclusivity").

^{16/} GTE Reconsideration Order, 93 FCC 2d at 839.

The Commission traditionally processes applications for domestic fixed-satellite space stations in groups.^{17/} Among other things, this allows the Commission to assign orbital locations more efficiently.^{18/} By taking into consideration a well-defined set of satellites, with particular launch schedules and technical characteristics, individual satellites can be assigned in a way to maximize use of the orbit-spectrum resource.^{19/}

The Commission's policies and group processing procedures in both the fixed satellite and direct broadcast areas have been carefully and successfully developed by the Commission for over two decades. They have fostered the growth of a vibrant domestic satellite industry by ensuring the "timely implementation of facilities and services"^{20/} and have successfully permitted the Commission to adjust its policies to account for the inherent flexibility of satellite technology to respond to changing circumstances and growing user needs, and to provide adequate service over a significant range of orbital locations.^{21/} They are now doing the same for DBS.^{22/}

^{17/} American Telephone & Telegraph and Ford Aerospace Satellite Services, 2 FCC Rcd, 4431, 4432 (1987); see, e.g., Licensing Space Stations in the Domestic-Fixed Satellite Service, 50 Fed. Reg. 36071 (1985); Filing of Applications for New Space Stations in the Domestic-Fixed Satellite Service, 93 FCC 2d 1260 (1983); Domestic Fixed-Satellite Service, 90 FCC 2d 1 (1982), recon. denied, FCC 83-183 (released June 20, 1983); Domestic Fixed-Satellite Service, 77 FCC 2d 956 (1980); Domestic Communications Satellite Facilities, 22 FCC 2d 86 (1970).

^{18/} See 1988 Orbit Assignment Reconsideration Order, 5 FCC Rcd at 182.

^{19/} AT&T/Ford, 2 FCC Rcd at 4432.

^{20/} GTE Reconsideration Order, 93 FCC 2d at 840.

^{21/} Id. at 838.

^{22/} Indeed, following HCG's launch of the first DBS satellite next month, DirecTv will initiate the first true DBS service in the United States -- that is, provision of a multichannel video programming service to home dishes approximately eighteen inches in diameter, via satellites operating in the DBS band at 12/17 GHz -- in early 1994. With its full complement of satellites in orbit, DirecTv will provide over a hundred channels of video programming

The Commission should not displace these policies. Although competitive bidding will be a useful license selection mechanism for many services, it is too untested a mechanism to incorporate into the fixed-satellite or DBS regulatory regimes, which have evolved in accordance with the unique requirements of those industries and concurrent consumer needs.

Subjecting FSS and DBS applications to the auction process could also have the unfortunate consequence of hindering new entrants into these services, especially given the maturity of the satellite industry. As the Commission has often recognized, the business of owning and operating satellite systems is by nature highly capital intensive. Subjecting new entrants to auctions would add to this inherent burden the considerable additional expense of having to pay for their satellite authorizations. This new cost not only could delay or prevent the new entrant's participation in the satellite business, but would also competitively disadvantage the new entrant to the extent that many of its established competitors did not have to pay a similar price for their authorizations.

The Commission's present licensing policies and procedures for FSS and DBS are proven, fair, and tailored to the unique aspects of these services. There is no sound policy reason to disrupt the balance that the Commission has achieved.

IV. CONCLUSION

Although the Commission's exercise of its competitive bidding authority will bring the public benefits in licensing many services, there is neither the substantive basis nor

directly to households throughout the United States.

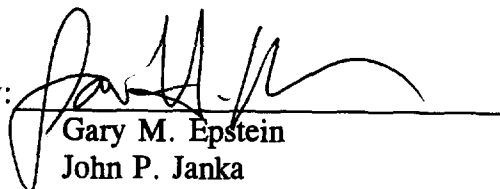
a sound policy reason for the Commission to alter the present procedures in licensing domestic-fixed and DBS satellites. The Commission therefore should decline to do so.

Respectfully submitted,

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